

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

NATIONAL NURSES ORGANIZING COMMITTEE-  
TEXAS/NATIONAL NURSES UNITED (BAY AREA  
HEALTHCARE GROUP, LTD. d/b/a CORPUS  
CHRISTI MEDICAL CENTER, an indirect  
subsidiary of HCA Holdings, Inc.)  
Respondent

and

Case 16-CB-225123

ESTHER MARISSA ZAMORA, an Individual  
Charging Party

*Roberto Perez, Esq.*, for the General Counsel.  
*Micah Berul, Esq.*, of Oakland California, for the Respondent.  
*Glenn M. Taubman, Esq.* and *Aaron B. Solem, Esq.*, of Springfield, Virginia, for the Charging Party.

**DECISION**

**Statement of the Case**

KELTNER W. LOCKE, Administrative Law Judge: The credited evidence fails to establish that any term or condition of employment of bargaining unit employees was determined, controlled, or affected by any agreement entered into by the Respondent other than the collective-bargaining agreement between the Respondent and the Employer, together with the “side letters” and memorandum of understanding it references. The record further fails to establish that any other agreement or document related to, affected, or was affected by the Respondent’s exercise of its authority and/or discharge of its duties as the employees’ exclusive bargaining representative. The Respondent’s refusal to provide to a bargaining unit employee a copy of another document, not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, did not violate Section 8(b)(1)(A) of the Act.

**Procedural History**

This case began on August 6, 2018, when the Charging Party, Esther Marissa Zamora, filed an unfair labor practice charge against the Respondent, the National Nurses Organizing

Committee-Texas/National Nurses United. The Board's Regional Office in Fort Worth, Texas, docketed this charge as Case 16-CB-225123.

Following an investigation, the Regional Director dismissed the charge by letter dated December 28, 2018. The Charging Party appealed the dismissal. On September 13, 2019, the Board's Office of Appeals sustained parts of the appeal and remanded to the Regional Director for further action.

On October 31, 2019, the Regional Director, acting pursuant to authority delegated by the Board's General Counsel, issued a complaint and notice of hearing. The Respondent filed a timely answer dated December 5, 2019.

The Respondent's answer included certain affirmative defenses. The third affirmative defense began as follows: "The Complaint was issued in furtherance of an unlawful scheme between the NRTW [National Right to Work Committee] and [the] NLRB General Counsel. . ." The Respondent further asserted that the General Counsel's action in issuing the complaint was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." The Respondent contended that any judgment or order arising out of this complaint would violate the Federal Administrative Procedures Act. The fourth affirmative defense in the Respondent's answer again referred to the General Counsel having an "unlawful scheme" and asserted that it violated the First Amendment rights of employees.

The General Counsel moved to strike these portions of the Respondent's answer. On January 10, 2020, the deputy chief administrative law judge issued an order granting the General Counsel's motion. It struck the Respondent's third and fourth affirmative defenses "as well as any other references to an alleged unlawful scheme." The order also stated as follows:

Furthermore, Respondent Union has not, as required by Section 102.20 of the Board's Rules of Procedure, admitted or denied the allegation in paragraph 8 that it refused to provide to the Charging Party, as requested on July 10, 2018, a copy of the neutrality agreement between Respondent and the Employer. Unless the answer is timely amended, this allegation is deemed admitted.

On January 29, 2020, the Respondent filed an amended answer. The Respondent also has petitioned for reconsideration of the deputy chief judge's ruling but in the absence of any ruling granting that petition, the January 10, 2020 order remains in effect.

The Charging Party also filed a motion to strike portions of the Respondent's answer and affirmative defenses and the Respondent filed an opposition to that motion. For reasons discussed below, I have concluded that the complaint against the Respondent should be dismissed, and reached that conclusion without considering the Respondent's defenses and arguments which are the subject of the Charging Party's motion. Because granting or denying the Charging Party's motion would not affect the outcome of the case, it is not necessary to rule on it.

On February 4, 2020, a hearing opened before me in Corpus Christi, Texas. On that day and the next, the parties presented evidence. Then, I adjourned the hearing until March 18, 2020,

when it resumed by telephone conference call so that counsel could present oral argument in lieu of briefs. After the oral arguments, I closed the hearing.

### **Amendment to Complaint Paragraph 6**

At hearing, the General Counsel orally amended complaint paragraph 6, which describes the bargaining unit of nurses which the Respondent represents. Bargaining unit employees work at a number of locations where the Employer provides services to the public, but the original complaint inadvertently left out one of these locations, 6629 Woolridge Road, Corpus Christi, Texas. As amended at hearing complaint paragraph 6 now reads as follows:

The following employees of the Employer, the unit, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

INCLUDED: All fulltime, regular part-time, and per diem registered nurses employed by the hospital at its facilities located at 3315 South Alameda Street; 7101 South Padre Island Drive; 7002 Williams Drive; 13725 Northwest Boulevard, Corpus Christi, Texas; 1702 Highway 181 North, Suite A-11, Portland, Texas, 78374; and 6629 Woolridge Road, Corpus Christi, Texas.

EXCLUDED: All other employees, confidential employees, physicians, nurse and/or clinical educators or coordinators, clinical nurse specialists, clinical coordinators, case managers/utilization review and/or discharge planners, nurse practitioners, accounting or auditing RNs, infection control/employee health nurses, risk management/performance improvement and/or quality assurance or quality management nurses, employees of outside registries and other agencies supplying labor to the Employer, already represented employees, permanent charge nurses, managerial employees, guards and supervisors as defined by the Act.

Based on the certifications of representative which are included in the joint exhibits, I conclude that this unit is appropriate and find that the Respondent is the exclusive bargaining representative of the employees in this unit.

### **Amendment to Complaint Paragraph 8**

Complaint paragraph 8 describes conduct which complaint paragraph 9 alleges to violate Section 8(b)(1)(A) of the Act. In the original complaint, paragraph 8 alleged that “[W]ithin the past six months, Respondent has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 10, 2018.”

After the hearing opened, and after the presentation of evidence, the General Counsel moved to amend paragraph 8 and I granted the motion. As amended, the paragraph now reads as follows:

(a) Within the past six months, Respondent has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 11, 2018.

(b) On or about July 25, 2018, Respondent, by its agent Bradley Van Waus, responded to the Charging Party's July 22, 3028 request in a manner that was arbitrary and/or in bad faith.

(c) Respondent owed the Charging Party a duty to represent her in good faith and by its actions described in paragraphs 8(a) and 8(b), it violated that duty.

By this amendment, the General Counsel has recast paragraph 8 of the original complaint as paragraph 8(a) of the amended complaint. The language of the original paragraph 8 is identical to the language of paragraph 8(a) in the amended complaint except that the original paragraph 8 alleged that the Charging Party requested the neutrality agreement "on or about July 10, 2018" whereas paragraph 8(a) of the amended complaint alleges that the Charging Party made this request a day later, "on or about July 11, 2018." The change corrects an error. The Charging Party made her request in a letter dated July 11, 2018.

### **Respondent's Answer to Complaint Paragraph 8**

After receiving the Respondent's original answer, the General Counsel moved to strike certain parts of it because those parts stated or implied that the General Counsel had engaged in misconduct. On January 10, 2020, the Deputy Chief Administrative Law Judge issued an order granting portions of the General Counsel's motion. That order also noted that "Respondent Union has not, as required by Section 102.20 of the Board's Rules of Procedure, admitted or denied the allegation in paragraph 8 that it refused to provide to the Charging Party, as requested on July 10, 2018, a copy of the neutrality agreement between Respondent and the Employer. Unless the answer is timely amended, this allegation is deemed admitted."

As discussed more fully later in this decision, the record fails to establish that Respondent had any kind of neutrality agreement with the Employer, and I conclude that it did not. Rather, I find that the Respondent, or a union affiliated with the Respondent, had entered into a "neutrality agreement" with HCA Holdings, Inc., of which the Employer was an "indirect subsidiary." It is possible that this agreement did govern the Employer's conduct during the Respondent's earlier organizing campaign which led to its certification, in 2010, as the exclusive bargaining representative. However, there is no evidence that it governed, affected or even mentioned either who could post notices on the bulletin board or any other term and condition of employment.

In this situation, the Respondent's answer accurately could have stated that it had not entered into any "neutrality agreement" with the Employer, that the only "neutrality agreement" was with the holding company, and that it did not pertain to or affect use of the bulletin boards or any other term or condition of employment. Instead, the Respondent answered more cryptically. Its answer only denied that it had "failed or refused to provide Charging Party with a copy of a

neutrality agreement with the Employer *that controls how the Employer can deal with her or has any effect on her working life with the Employer* as requested in Charging Party's July 11, 2018 letter to Respondent." (Italics added.)

5 After the January 10, 2020 order which granted portions of the General Counsel's motion to strike, the Respondent filed an amended answer which deleted the portions of its original answer which the Deputy Chief Judge had ordered stricken. However, this amended answer did not resolve the ambiguity inherent in its original answer to complaint paragraph 8. The amended answer again denied that the Respondent had "failed or refused to provide Charging Party with a  
10 copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent."

15 Is the Respondent's answer to paragraph 8(a) sufficient to satisfy the requirement, in Section 102.20 of the Board's Rules and Regulations, that a respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint? If it is not, then the allegation may be deemed admitted.<sup>1</sup>

20 Section 102.20 applies to "any allegation in the complaint." However, is the existence of a "neutrality agreement" actually alleged in the complaint? As discussed further below under the heading "The Neutrality Agreement," neither the complaint nor the amended complaint separately and specifically alleges that a neutrality agreement exists. Rather, both paragraph 8 of the original complaint and paragraph 8(a) of the amended complaint simply *assume* the existence of such a document by alleging that the Respondent has failed to provide a copy of "its neutrality agreement  
25 ..."

If the complaint had alleged that a neutrality agreement existed instead of assuming that fact, the Respondent clearly would have been required to admit or deny such a document's existence. However, I have some concerns that the wording of the present complaint did not place  
30 the Respondent on notice that it needed to deny the existence of any neutrality agreement.

Moreover, although the Respondent's answer to amended complaint paragraph 8(a) is more cryptic than it needed to be, other parts of the Respondent's answer explained its position. The Respondent included in its answer certain affirmative defenses, one of them being that it, as  
35 the exclusive bargaining representative, only had a duty to furnish to the Charging Party any agreement which affected her terms and conditions of employment, and that no "neutrality agreement" had such an effect. Section 102.20 requires a respondent to admit, deny or *explain*,

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<sup>1</sup> Sec. 102.20 of the Board's Rules and Regulations, as amended, requires a respondent to "specifically admit, deny, or explain each of the *facts alleged in the complaint*, unless the respondent is without knowledge, in which case the respondent shall so state. . ." (Italics added.) Sec. 102.20 further provides, in pertinent part, that "any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

and I conclude that the Respondent's answer included sufficient explanation to satisfy the rule. Further, I conclude that the Respondent effectively has denied the allegations raised in paragraph 8 of the complaint, as amended.

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### Admitted Allegations

The Respondent has admitted the allegations raised in complaint paragraphs 1, 2(b), 2(c), 3, 4, and 7, and also has admitted the allegations set forth in portions of complaint paragraphs 2(a), 5(a), and 6. Based on the Respondent's answer and the joint exhibits, I find that the General  
10 Counsel has proven these allegations.

More specifically, I find that the charge was filed and served as alleged in complaint paragraph 1, that the Respondent is a labor organization, as alleged in complaint paragraph 4, and that at all times material to this case Labor Representative Bradley Van Waus has been an agent  
15 of the Respondent within the meaning of Section 2(13) of the Act, as alleged in complaint paragraph 5.

Further, I find that the Respondent is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of employees in a bargaining unit which is appropriate within  
20 the meaning of Section 9(b) of the Act, and that these employees work for Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center (herein called the "Employer"), at its Corpus Christi, Texas, facility. Based on certifications of representative which the parties introduced into evidence as joint exhibits, and which are dated June 7, 2010, and September 14, 2016, I conclude that the Respondent has been the exclusive bargaining representative at all times material to this  
25 case. The Employer and the Respondent have entered into successive collective-bargaining agreements, two of which, covering the relevant time period, are part of the present record.

Additionally, based on the Respondent's admissions, I find that the Employer satisfies the Board's standards for the exercise of its jurisdiction, that it is an employer engaged in commerce  
30 within the meaning of Section 2(2), (6), and (7) of the Act, and that it is a health care institution within the meaning of Section 2(14) of the Act.

The Respondent has denied the allegation, in complaint paragraph 2, that the Employer is an "indirect subsidiary of HCA Holdings, Inc." However, for purposes of determining whether  
35 the Board can and should assert jurisdiction over the Respondent, the Employer's possible status as a subsidiary is irrelevant. Because the Respondent is the exclusive representative of an appropriate bargaining unit of employees who work for an employer clearly within the scope of the Act and clearly subject to the Board's jurisdiction, I conclude that the Board properly exercises its jurisdiction in this case.

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### Respondent's Motion to Strike

The Respondent has filed a "Motion to Strike, Or In The Alternative, Dismiss Portion of Paragraph 5 of the Amended Complaint." Specifically, the Respondent seeks to strike from  
45 paragraph 5 of the amended complaint the allegation that "Maria (last name unknown)" held the

position of “Representative” and was an agent of the Respondent within the meaning of Section 2(13) of the Act.

In its motion, the Respondent contends that this allegation is irrelevant and further asserts that a previous settlement acts as a bar preventing litigation of whether Maria (last name unknown) is the Union’s agent. Based on the Respondent’s settlement bar argument, I infer that someone named Maria may have acted, or may have been alleged to have acted, on behalf of the Respondent in a previous case which the Respondent settled. However, it is not necessary to consider this matter because the record does not establish that anyone named Maria took any action relevant to the unfair labor practice alleged in the present complaint.

Although the Respondent contends that the allegation concerning Maria’s agency status should be stricken from the complaint, or in the alternative dismissed, it suffices to conclude that the General Counsel has not proven this allegation, and I so find.

### **The Facts**

Charging Party Zamora, a registered nurse, works in the bargaining unit represented by the Respondent but is not a member of that union, which she opposes. In 2018, she tried to persuade other employees to support her effort to decertify it.

The Employer allows employees to use a conference room to conduct meetings, sometimes called “in-services,” which other workers can attend. Zamora requested and received permission to hold meetings to discuss the Union. To publicize such meetings, she prepared an announcement titled “Making A Critical Decision, Evaluating Pros and Cons, What Has Your Union Done For You?” It concluded with information regarding when and where the meetings would be held.

Zamora wanted to post copies of this notice on bulletin boards where employees could see them. The Employer maintains two types bulletin boards. Certain of the boards are open and available to employees who wish to post notices. Other bulletin boards are behind glass and must be unlocked to gain access. The Employer uses such locked (or “protected”) bulletin boards for its own “official” notices. Under its collective-bargaining agreement with the Respondent, it also provides bulletin boards, both open and “protected,” for the Respondent to use. Specifically, article 4, Section 3 of that contract states, in part:

For the posting of union notices communicating to bargaining unit employees, the Hospital will make available to the union a dedicated bulletin board in each break room in each Nursing Department and one (1) locked bulletin board in the following location at each campus: at Bay Area/Heart Hospital on the first floor in the hallway between Radiology and the Cafeteria; at Doctors Regional on the first floor across from the Pharmacy entrance; at Northwest Regional on the first floor in the hallway leading to the cafeteria; and at Northshore Emergency in the hallway outside the employee breakroom.

Zamora could not unlock the protected bulletin boards. Instead, she affixed her flyer to the outside of the glass, at a spot where it would not cover up anything posted on the inside. She also posted copies of the flyers on break room walls. However, someone later removed the flyers.

On June 20, 2018, Zamora sent an email to the Employer's vice president of human resources, Vince Goodwine. The record indicates she also sent a copy of this email to Michael Lamond, whom Zamora identified as the Employer's liaison with the Union. The email stated:

I would like to file a formal complaint against the NNOC union organizers for removing my in-service flyers from the nurse's break rooms and other bulletin boards through Dr's Regional Medical Center. There are a few of us who are opposed to having this particular union represent us and would like to educate our coworkers on another perspective or viewpoint. These are educational in-services with the intent to open up a dialogue regarding the pros and cons of unionization. We cannot educate our peers if they are unaware of our in-services.

Today at approximately 1230pm, an NNOC union organizer walked out of my break room on Rehab. I went directly into my break room and noticed my flyer was gone. I immediately walked back out and down the hall and encountered this individual and asked for her name. She stated her name was Maria and informed me she was an organizer for the union. I asked her if she had removed my flier from our break room and she stated she had. I informed her that I would expect mutual respect from the union as I do not go to their boards and remove their bulletins/flyers, etc. She responded that I'm not allowed to as that is their designated space. I questioned what gave her the right to remove my flyer as it was not even on the union board as she claims it was. I corrected her and stated the corked area was their personal board space and my flier was on the wall. I demanded she return my flier back to me of which she did. I also informed her that Lynn James and I met with three of the Union nurse reps and discussed our flyers being removed. All three agreed it was not right and would discuss with their fellow members. Maria stated that she can't tell the nurses what to do and she has no control, insinuating to me that the fliers are going to be continued to be taken down.

Mike, please follow up with the appropriate individuals to be respectful and leave our educational in-service flyers alone. I promise you, they will not occupy any space or area on their bulletin boards but rather on the walls.

Thank you for your immediate attention.

On the same day, Goodwine sent Zamora the following reply:

Thanks for your email. All employees have the same privilege in use of our employee information bulletin boards.

I'll defer to Michael to resolve with the NNOC.



Thanks again for your email.

On June 28, 2018, Zamora telephoned Michael Lamond. She testified that she told Lamond about the flyers which she had posted being removed and asked for permission to use “the protected bulletin board.” According to Zamora, Lamond said that permission had been denied “because of my opposition. It pertained to being antiunion.”

The Respondent raised a hearsay objection to Zamora’s testimony concerning what Lamond told her. Lamond did not testify and the record suggests that he may have died. The Employer is not a party to this proceeding and even if it were, the record does not establish that Lamond was the Employer’s agent. Therefore, I did not receive Zamora’s testimony concerning Lamond’s words for the truth of the matter asserted, and make no findings concerning what Lamond actually said to Zamora during this telephone conversation.

Moreover, Zamora’s testimony was so vague it doesn’t credibly establish what she said during this conversation. For example, she said that they discussed a “neutrality agreement” but her testimony does not reveal how that topic arose. Zamora did not indicate whether she raised the subject or he did. She testified, in part:

I talked to him at great length about the denial and it being unfair and biased on my employer’s part. I felt like I was being treated unfairly. We discussed the Neutrality Agreement. I talked to him about that I was fully aware or felt very strongly that there was a Neutrality Agreement based on my --

Thus, Zamora did not say that Lamond brought up the subject of a neutrality agreement. To the contrary, her testimony provides some reason to doubt that Lamond mentioned it first. If Lamond had said “you can’t post on the protected bulletin boards because the company has a neutrality agreement,” Zamora would have had definite knowledge that such an agreement really existed and, presumably, would have testified to that effect.

However, Zamora did not testify that Lamond said anything which would indicate that a neutrality agreement was affecting who had access to the bulletin boards. Instead, she testified she told Lamond she was “fully aware or felt very strongly that there was a Neutrality Agreement. . .”

If Zamora said those words to Lamond, and if a neutrality agreement indeed limited who could post notices on the bulletin boards, presumably Lamond, in response, would have acknowledged that her hunch was correct. However, she did not quote Lamond as saying anything which reasonably would be considered an affirmation that, as she suspected, there was a “neutrality agreement” with provisions pertaining to use of the bulletin boards

After Zamora gave the testimony quoted above, the Respondent raised an objection, which I overruled. Zamora then testified:

Yes, we talked about a Neutrality Agreement that I firmly believed had to be in place based on my past experience with a Neutrality Agreement. I felt that there was something in that

that was preventing my hospital from granting my request for these privileges. He did discuss that there was a Neutrality Agreement but that it had expired or a certain portion of it had expired. There --

5       The vagueness of Zamora's testimony diminishes its credibility. She did not quote Lamond as saying that there was something in a neutrality agreement that prevented her from posting on the locked bulletin boards but only testified that *she felt* there was. Moreover, she is less than clear about whether Lamond told her that there had been a neutrality agreement which had expired or whether he said that part of it had expired. Additionally, although she left open the possibility that Lamond said that only part of the agreement remained in effect, Zamora provided no specific information about the contents of any such part.

10       Clearly, Zamora considered access to the locked bulletin boards a matter important enough to raise with the Employer's vice president of human resources, who referred her to Lamond. She testified that she talked with Lamond "at great length" and protested that she was being treated unfairly. Certainly, she would have considered her conversation with Lamond important.

15       People tend to remember conversations concerning matters they consider important more than they do discussions about subjects they believe trivial or inconsequential. Similarly, when a person is seeking redress for perceived unfair treatment, emotion burns the matter into memory. Without doubt, Zamora had strong feelings about the bulletin board issue. Otherwise, she would not have contacted Goodwine and Lamond and spoken with the latter "at great length." Yet Zamora's description of the conversation is nebulous and nonspecific. This inconsistency creates the impression that either the witness is not telling the full story or that her memory is too sketchy to be reliable.

20       Even assuming that Zamora testified to the best of her recollection, her testimony does not support a conclusion that Lamond brought up the existence of a neutrality agreement or cited it as a reason for denying Zamora permission to post her flyer on the protected bulletin boards. As noted above, Zamora did *not* say that she believed there was a neutrality agreement because *Lamond* said that such an agreement existed. Rather, she testified that she "firmly believed" that a neutrality agreement had to be in place "based on my past experience with a Neutrality Agreement."

25       Her "past experience with a Neutrality Agreement" had nothing to do with her present Employer. She began working for that Employer in February 2012. Two years before that, in January 2010, Zamora gave testimony about neutrality agreements before a Congressional committee.

30       This history raises the possibility that Zamora, not Lamond, raised the matter of neutrality agreements and that she did so because of a longstanding opposition to such agreements in general and not because a neutrality agreement somehow had precluded her from posting a flyer on a protected bulletin board. Significantly, Zamora did not testify that Lamond *volunteered* that a neutrality agreement was the reason she could not post a notice on the protected bulletin boards. If anything, her testimony points in another direction.

Therefore, I am somewhat concerned that Zamora is attempting to make this case a vehicle for obtaining a precedent establishing that a union has a duty to furnish employees, on request, a copy of an existing neutrality agreement when, in fact, the neutrality agreement had nothing at all to do with the Employer's decision denying Zamora access to the protected bulletin boards.

However, even if Zamora did not harbor such an ulterior motive—an "ax to grind" concerning neutrality agreements in general—the vagueness of her testimony leads me to give it little weight. Thus, even if Zamora is not seeking to set a precedent for the principle that a union has a duty to disclose neutrality agreements to bargaining unit employees, her testimony—that she *believed* that a neutrality agreement was preventing her from posting her notice, based on her *past experience* with a neutrality agreement—leads me to conclude that she simply was speculating, and that some previous experience unrelated to her present Employer inclined her speculation in that direction.

Zamora's testimony about what Lamond said constitutes hearsay which cannot be used to establish the truth of the matters Lamond asserted. But even apart from being hearsay, Zamora's nebulous testimony would fall short of establishing either that the Employer had entered into a neutrality agreement with the Respondent or that such agreement was the reason why the Employer would not allow her to use the locked bulletin boards.

On July 3, 2018, Zamora sent an email to Lamond, with copies to several people, including Vice President of Human Resources Goodwine. She included in that email a copy of Goodwine's reply to the email which she had sent Goodwine on June 20, 2018. (Goodwine's brief reply, also dated June 20, 2018, is quoted in full above.) Zamora's July 3, 2018 email to Lamond stated:

On Thursday, June 28th, I spoke to you concerning my request for the protected bulletin board and you said I was denied because it pertained to opposition to the Union. I've included Mr. Goodwine's response below which state[s] all employees have the same privilege in use of informational bulletin boards. Are you both telling me that ALL employees would be denied use of the protected boards. Because as I see it, the employees that are pro-union are getting all the privileges and those of us anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established. This is very unfair and biased on my employer[']s part and I am requesting you and those you report to review our policies to establish fairness across the board to All employees. I would greatly appreciate your immediate response as my team's window is extremely limited.

Zamora testified that "my team's window" referred to the "window" of time for filing a decertification petition.

It is important to give one statement in this email particular scrutiny. Zamora wrote that "as I see it, the employees that are prounion are getting all the privileges and those of us [who are] anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established." Zamora's testimony indicates that she made a similar claim of disparate treatment during her June 28, 2018 telephone conversation with Lamond:

Q. What do you recall about that discussion [with Lamond]?

A. We discussed -- I discussed again about my fliers being removed and I couldn't keep them up. Then I asked him about the protected bulletin board. I felt that *the pro-union nurses* had this privilege and that I should have the same privilege. Just because I'm on the opposing view should not deny me that privilege and that I was having great difficulty getting permission to use it.

(Italics added.) Zamora thus appears to be claiming that the Employer was treating *individual nurses* in two different ways, depending on their support for or opposition to the Union. Specifically, her words imply that the Employer was allowing prounion nurses (acting on their own as individuals and not on behalf of the Respondent) to post messages supporting the Respondent behind the glass of locked bulletin boards, but denying her right to post antiunion messages.

Zamora's words therefore might create the impression that a secret agreement between the Employer and the Respondent—an agreement apart from the collective-bargaining agreement—resulted in certain employees receiving a workplace privilege denied to other employees. Taken at face value, they suggest that some employees are coming to the Employer with prounion messages and that the Employer allows these to be posted behind glass, while denying Zamora the right to post anti-union messages.

Such a situation is highly implausible. The Respondent is well established as the collective-bargaining representative, and is a party to a contract with the Employer. An individual employee who favors such an incumbent union has little if any reason to post a notice expressing support for it. Typically, such employees simply would maintain their memberships in the union by paying dues. They also might attend meetings and participate in union matters and perhaps express their support to coworkers. However, it would be unusual for an employee who wasn't acting on behalf of the union to seek to post an announcement supporting it on a locked bulletin board.

Because of my concerns about the impartiality of Zamora's testimony, and also because it would be out of the ordinary for an individual prounion employee to seek to post a notice supporting an incumbent union on a locked bulletin board, I have looked to the record for corroborating evidence. However, there is no evidence of any instance in which an individual employee requested and was granted permission to post a prounion notice on a protected bulletin board. Indeed, the record does not establish that any individual employee, other than Zamora, sought permission to post any kind of message behind the glass.

In other words, the record does not establish that a privilege to post notices on a locked bulletin board was a condition of employment enjoyed by any bargaining unit employee. I find that it was not. Likewise, the credible evidence is insufficient to establish that the Employer had a practice of allowing individual employees to post notices of any kind on protected bulletin boards.

The Respondent's right to post notices on a locked bulletin board was not a condition of employment of any bargaining unit employee, and it was not a right established by a secret agreement. To the contrary, the collective-bargaining agreement conferred this right on the Respondent so that it had a means of communicating with bargaining unit employees. The Respondent did not keep this contract secret and, as noted below, provided Zamora a copy of it.

On July 8, 2018, Zamora sent another email to Lamond, with copies to Goodwine and some other managers. That email stated:

I have been told on numerous occasions, from you, Mr. Goodwine, and several others that I can not have a protected bulletin board because it would be "facilitating" anti-union support. By not providing me with the same privileges you are thereby facilitating pro-union support. I would very much like to see this language in writing. I am formally requesting a copy of the Neutrality Agreement between HCA and NNOC at your earliest convenience. I will gladly make a trip to your office to retrieve or if you like you can email it to me. Mr. Goodwine informed me that it is an HCA policy. I cannot find this so-called policy. Can you direct me to that as well, please?

The Employer did not provide Zamora with a copy of any neutrality agreement. She then requested the same document from the Respondent. Her July 11, 2018 letter to the Respondent stated:

TO WHOM IT MAY CONCERN:

My name is Esther M. Zamora. I am an RN employed at Corpus Christi Medical Center-Doctor's Regional Hospital in Corpus Christi, Texas and am currently represented by the National Nurse's Organizing Committee. I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility. I understand that the first stage has expired, but that my employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa. Since my working life at Corpus Christi Medical Center-Doctors Regional Hospital is being affected by the neutrality agreement's current terms and conditions, I have a right to a copy of this Agreement and you have a fiduciary duty to provide it to me. Please send the agreement to me as soon as possible, and no later than 14 days from now. If you refuse to send it, please explain your refusal. I thank you kindly for your expedited services.

It may be noted that Zamora's letter stated as fact some assertions which the present record does not substantiate. For example, no credible evidence indicates that her employment "remains governed by the second, post-organizing stage" of a neutrality agreement. Indeed, the record does not establish that there is a neutrality agreement with two portions, or that one of those "stages" remained in effect at the time of this letter. The credited evidence also does not prove that any

agreement other than the collective-bargaining agreement affected the terms and conditions of employment of bargaining unit employees.

Labor Representative Bradley Van Waus, whom the Respondent has admitted to be its agent, answered Zamora's letter: Van Waus' reply, dated July 25, 2018, states as follows:

Dear Ms. Zamora:

Thank you for your letter of July 11, 2018. There is no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015-June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center. Enclosed is a copy of that collective bargaining agreement.

If you have issues or concerns involving terms and conditions of your employment, please do not hesitate to contact NNOC Labor Representative, Bradley Van Waus who can be reached at 240-460-0352.

Sincerely,

Bradley Van Waus

The record does not indicate that Zamora filed or attempted to file a grievance concerning the denial of her request to post a message on the locked bulletin boards or seeking access to those boards. Additionally, the record does not establish that Van Waus, or any agent of the Respondent, had any other communication with Zamora, apart from this July 25, 2018 letter, concerning her request for a copy of the "neutrality agreement." At hearing, the General Counsel amended complaint paragraph 8 to add an allegation that this July 25, 2018 response to Zamora violated Section 8(b)(1)(A) because it was arbitrary or in bad faith.

### **The Neutrality Agreement**

There is a threshold question which must be addressed before moving on to the allegation that the Respondent refused to provide the Charging Party with a neutrality agreement it had entered into with the Employer: Does any such agreement exist?

Based on uncontroverted evidence, I find that the Respondent did not provide Zamora with any document titled "neutrality agreement." Indeed, the record clearly establishes that the Respondent did not furnish Zamora with any document at all other than the collect-bargaining agreement.

However, the General Counsel must prove more than that the Respondent did not furnish the Charging Party with a requested document. As a threshold matter, the government first must establish that such a document existed and then must prove that the Respondent, as exclusive bargaining representative, had a duty to provide it to a requesting employee.

These predicate conditions—that the document in question actually exists and that the union has a duty to furnish it upon request by a bargaining unit member—cannot simply be assumed to be true. If a bargaining unit employee asks the exclusive bargaining representative for a copy of a document which does not exist, and that union tells the employee that no such document exists, there can be no breach of the duty of fair representation. An exclusive bargaining representative cannot, and does not have to, furnish a nonexistent document.

That principle seems so axiomatic it hardly needs to be mentioned. However, in the present case, there are complicating factors which make it advisable to state the obvious: First, the Charging Party’s July 11, 2018 request, when read carefully, turns out to be more ambiguous than it initially appears. Second, the complaint does not separately allege that a neutrality agreement exists, but just assumes that fact. Third, the Respondent answered the complaint in such a way that it could not be certain whether or not a document entitled “neutrality agreement” actually existed. These three factors come together to create a muddle, a nearly perfect cyclone of ambiguity.

#### The Charging Party’s July 11, 2018 Request

The Charging Party’s July 11, 2018 letter to the Respondent states that she was “formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility.” If considered just by itself, that language seems pretty clear. However, what the letter says next muddies the water.

After requesting a copy of the neutrality agreement, the Charging Party’s letter goes on to state that she understood that the neutrality agreement had two parts, and that the first part had expired. Did that mean that the Charging Party was *only* asking for what she believed to be the unexpired part? Her letter doesn’t say, at least not explicitly. However, what reason would she have had even to mention her belief that the agreement had two parts unless she only sought the portion which had not expired?

The next words in her letter support a conclusion that the Charging Party intended to convey that she only sought the unexpired portion of the agreement. These words express her belief that her “employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa.” These words offer an explanation of why she was requesting the document and also describe why she believed that the Respondent had a legal duty to give her a copy of this agreement.

In these circumstances, I conclude that someone who read this letter reasonably would understand it to be a request only for the supposedly unexpired portion of the neutrality agreement, and would also reasonably understand that the Charging Party wanted this portion of the agreement because she believed that it had an effect on her working conditions. Further, I conclude that she intended the letter to communicate that message.

### The Complaint

As noted above, the complaint does not separately allege the existence of a neutrality agreement. But there is an additional potential source of ambiguity. Paragraph 8(a) of the amended complaint alleges that the Respondent “has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, *as requested on or about July 11, 2018.*” (Italics added.)

For reasons discussed above, I conclude that someone reading the July 11, 2018 request reasonably would understand that the Charging Party was asking only for the portion of the neutrality agreement which had not expired. Therefore, it is not entirely clear from the complaint whether the General Counsel contends that the Respondent’s failure to furnish the Charging Party the entire neutrality agreement was a violation, or only the failure to provide the conjectured unexpired portion.

### The Respondent’s Answer

The Respondent’s answer stated that it “specifically denies that it failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party’s July 11, 2018 letter to Respondent.” The Respondent’s answer also included an affirmative defense which further explained its position. For reasons discussed above, I have concluded that the Respondent’s answer satisfied the Section 102.20 requirement to “specifically admit, deny, or explain each of the facts alleged in the complaint. . .” However, in view of my conclusion that the Charging Party’s July 11, 2018 letter reasonably would be understood to be a request *only* for the unexpired portion of the neutrality agreement, the part which she felt might affect her working conditions, I further conclude that the Respondent has effectively denied the existence of the document which the Charging Party requested.

Of course, that still leaves unanswered the question of whether there exists some document titled “neutrality agreement” which does *not* include any provisions affecting terms and conditions of employment. Although this issue need not be reached to decide whether the Respondent committed an unfair labor practice, if left unresolved it would an untidy loose end.

Before and at first during the hearing, the Respondent repeatedly avoided revealing whether or not it had entered into any other pact called a “neutrality agreement,” that is, into a “neutrality agreement” which did *not* affect terms and conditions of employment. It is puzzling why the Respondent worked so hard to leave uncertain whether or not any kind of neutrality agreement existed. The existence of such a document would not have affected the Respondent’s argument that it had no duty to provide an employee with such an agreement, or, indeed, with any document which did not pertain to or affect the terms and conditions of employment of bargaining unit employees.



The Respondent advanced this argument in the second “affirmative defense”<sup>2</sup> it included with its answer to the complaint. It states, in part:

Under current Board law Respondent’s duty to provide agreements or documents requested by Charging Party are limited to those which reflect or affect her terms and conditions employment.

The “affirmative defense” then states, in effect, that a neutrality agreement “sets terms and conditions for a democratic process to determine a petitioning union’s majority support in a bargaining unit” but does not affect the terms and conditions of employment of bargaining unit employees.<sup>3</sup>

It would not have detracted from this argument for the Respondent to have admitted that, in connection with its efforts to organize the employees of the Employer and other subsidiaries of HCA Holdings, Inc., it had entered into a “neutrality agreement” with the holding company. Indeed, this question—whether any “neutrality agreement” existed—would not go away. It arose during the hearing when the General Counsel sought to introduce a position statement submitted to the Board’s Regional Office by the attorney for HCA Holdings, Inc., during the investigation of a related matter, a charge which Zamora had filed against the holding company and the Employer because she had been denied the use of the locked bulletin boards. (The position statement, dated October 17, 2018, identified that case as *Corpus Christi Medical Center and HCA Holdings, Inc.*, 16-CA-225103. It is not before me.)

During this discussion, the existence or nonexistence of a neutrality agreement remained unclear. Therefore, I asked the Respondent’s counsel about it:

JUDGE LOCKE: Well, let me ask you this: Is there any agreement between the Employer and the Union, other than the Collective Bargaining Agreement?

MR. BERUL: There is none.

JUDGE LOCKE: There is none.

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<sup>2</sup> The term “affirmative defense” appears to be a misnomer because the Respondent does not bear the burden of pleading or proving that the requested document did not relate to terms and conditions of employment. Rather, the General Counsel bears the burden of establishing that the document sought pertains in some way to the Respondent’s duties as the exclusive bargaining representative.

<sup>3</sup> The “affirmative defense” then concludes with a somewhat fuzzy argument which, I believe, can be expanded and restated more plainly as follows: The Charging Party indicated that she believed part of the neutrality agreement remained in affect, but if so, that portion did not pertain to the working conditions of employees in her bargaining unit but instead set rules which the parties would follow when the Respondent tried to organize employees at other facilities controlled by HCA Holdings, Inc. Such provisions do not apply to the Charging Party or her bargaining unit and, therefore, the Act does not require the Respondent to furnish her with a copy.

MR. BERUL: The Employer being Corpus Christi Medical Center,  
there is none.

5 JUDGE LOCKE: So, how about between the Union and  
the HCA Holdings?

MR. BERUL: There are —I think there is probably multiple  
agreements, but I don't know the answer exactly.  
10 But I will say definitively, there is not any  
agreement between HCA Holdings and  
Respondent Union, that has any impact on terms  
and conditions of employment of the employees of  
Corpus Christi Medical Center, and it is not our  
15 burden to prove -- we are innocent until proven  
guilty. They haven't proved anything.

JUDGE LOCKE: Well, is there any agreement between the  
Union and HCA Holdings that -- as to how  
20 the Employer will act in the face of a union  
organizing effort, or in the face of an  
election [conducted] by the Labor Board?

MR. BERUL: You mean, like what —what position they would  
25 take with regard to —

JUDGE LOCKE: Yes.

MR. BERUL: There is not.  
30

This statement by the Respondent's counsel appears to conflict with the position letter  
submitted by HCA Holdings, described above, which I received into evidence. That letter  
identified the Employer, Corpus Christi Medical Center (CCMC), as an indirect subsidiary of HCA  
Holdings, Inc., and stated, in part:

35 HCA Holdings, Inc., is a party to an agreement with California Nurses Association,  
of which NNOC—Texas, NNU is an affiliate. That agreement requires the parties  
and their affiliates to conduct their relationships in a manner consistent with mutual  
respect and joint commitment to problem solving. The agreement does not govern  
40 the terms and conditions of employment of bargaining unit employees at CCMC.

The position statement further stated that the “agreement provides that neither CCMC nor HCA  
Holdings shall encourage or support decertification, but does not otherwise limit how they can deal  
45 with bargaining unit employees.”

Thus, this position letter contradicted to some extent the representations of the Respondent's attorney during the hearing. However, neither HCA Holdings nor the Employer is a party to this proceeding, and neither appeared at the hearing. Therefore, there was no opportunity during the hearing to explore the differences between the HCA Holdings position letter and the representations of the Respondent's counsel.

However, the week before the hearing opened, the attorney for HCA Holdings and the Employer did participate in a prehearing conference call concerning petitions to revoke subpoenas, including a petition to revoke a subpoena served by the Charging Party. This subpoena sought to require HCA Holdings and the Employer to produce the neutrality agreement.

The Charging Party's subpoena and the petition to revoke presented an unusual issue. It involves the seemingly paradoxical and uncommon situation in which it is appropriate for the judge to revoke a subpoena seeking information which is relevant to the case. Ordinarily, of course, the judge's job is to revoke a subpoena seeking evidence which does *not* relate to "any matter under investigation or a question in the proceedings. . ." See Section 102.31(b) of the Board's Rules and Regulations. However, on those rare occasions when a subpoena for *relevant* information would deny a party due process, such a subpoena may be revoked notwithstanding the relevance of the information sought. Such rare occasions involve cases in which the alleged violation itself is a refusal to furnish the information and the remedy would be an order directing that the information be provided.

When the Board finds that a respondent has violated the Act by refusing to provide requested information, it remedies that unfair labor practice by ordering the respondent to do so. However, the Board issues such an order only after the General Counsel has proven a violation. To accomplish the same result by use of a subpoena, before evidence had been received and considered, would short-circuit the adjudicative process and eliminate the requirement that a violation be established before a remedy is ordered.

In *Electrical Energy Services, Inc.*, 288 NLRB 925 (1988), the Board approved its administrative law judge's revocation of a subpoena which would have required the respondent to produce the same document that it allegedly had withheld unlawfully. The judge's decision stated:

In the instant case, the General Counsel is attempting to use the subpoena duces tecum as a substitute for the Board order sought by the complaint. Not only is this procedure improper, but it is an abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question.

288 NLRB at 931.

This holding in the *Electrical Energy Services* case concerned a subpoena which the General Counsel had directed towards the respondent. In contrast, the subpoena at issue here comes at the behest of the Charging Party and is directed to the Employer and HCA Holdings,

which are not parties to this proceeding. Thus, the subpoena would not require the *Respondent* to take the same action it would be ordered to take if found, after hearing, to have violated the Act. Indeed, it would not require the Respondent to take any action. So, it would not directly deny the Respondent's due process by requiring the Respondent to take the same action it would only have  
 5 to take if the government proved that withholding the information had violated the Act. But it would, in a sense, commandeer the Board's subpoena power to obtain a document which the Charging Party might otherwise (if the government failed to prove a violation) have no right to see.

10 Because of these differences, in both the recipient of the subpoena and the party serving it, *Electrical Energy Services* is not squarely on point. Moreover, the present issue, unlike that in *Electrical Energy Services*, involves the clash of two competing principles, both of which are important.

15 On the one hand, although the subpoena would not require any disclosure by the Respondent, the Charging Party nonetheless would receive the document which the Respondent, and also presumably the Employer, wished to keep secret. Even though the Respondent was not the subpoenaed party, it was a party to the agreement, and thus had some legitimate interest in keeping the document secret.

20 Additionally, the legal principle that the Act imposes on an exclusive bargaining representative a duty to provide requested information concerning the performance of its statutory duties comes with the corollary that the Act does *not* require a union to furnish a requesting employee with information *not* related to its statutory duties. The Board therefore lacks statutory  
 25 authority to require a union to provide such information. If the Board has no authority to order such a remedy, may it achieve the same result by allowing a party to subpoena the same information from another source?

30 On the other hand, granting the petition to revoke the subpoena would deny the Charging Party evidence highly relevant to a central, indeed dispositive issue: Whether the neutrality agreement actually affected or pertained to terms and conditions of employment or whether it simply concerned how the Employer would act during an organizing campaign and election. The neutrality agreement itself would be the most relevant evidence needed to resolve this issue and might be the only evidence.

35 Although HCA Holdings and the Employer are not parties in this proceeding, I requested their counsel to be present, along with counsel for the various parties, during a telephone conference call the week before the hearing. During this prehearing conference call, after discussion of the issue, I told counsel that I would not grant the petition to revoke the subpoena at  
 40 this point but rather would examine the neutrality agreement *in camera* before deciding how to proceed.

45 Such *in camera* examination is disfavored and should be used only rarely. However, in this instance, there appeared to be no ready alternative which would balance the competing interests. An *in camera* examination would allow me to determine whether the neutrality agreement included any provisions which affected the bargaining unit employees' terms and

conditions of employment. If so, I could order that other portions of the document be redacted before it was provided to the Charging Party. Thus, only the provisions relevant to the present case would be revealed. But if the neutrality agreement included no provisions affecting the terms and conditions of employment of bargaining unit employees, then I would grant the petition to

On February 3, 2020, the day before the hearing opened, the attorney representing HCA Holdings and the Employer sent me an email, with copies to counsel in this proceeding. That email stated:

I have discussed with my clients the in camera inspection of documents responsive to Charging Party's subpoenas duces tecum. Respectfully, they do not intend to produce documents for in camera inspection. As the cases we cited in our Petitions to Revoke establish, the Board has held that where the primary issue to be decided in the unfair labor practice hearing is whether the Charging Party is entitled to the requested information, the information cannot be obtained by a subpoena. That being the case, regardless of the outcome of any in camera inspection, the requested documents cannot be obtained by Charging Party's subpoenas duces tecum. Accordingly, my clients do not intend to produce documents for in camera inspection.

HCA Holdings and the Employer did not produce the subpoenaed neutrality agreement and their attorney did not attend the hearing.

When a subpoenaed individual or company does not comply with a subpoena, the Board may petition a federal district court to issue an order enforcing the subpoena. See, e.g., *United Refrigerator Services*, 325 NLRB 258 (1998). However, the record does not indicate that the Charging Party sought such enforcement and I conclude that it did not.

When a *party* to a Board proceeding fails to comply with a subpoena served on it by an opposing party, the Board may impose a variety of sanctions. These sanctions include permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 (2004); *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986); *Bannon Mills*, 146 NLRB 611 (1964).

However, HCA Holdings and the Employer are not parties to this proceeding. Therefore, even were it possible, imposing a sanction would not be appropriate. More specifically, it would not be proper to draw an adverse inference, binding on the Respondent, when the Respondent was not the party served with the subpoena and did not refuse to comply with it.

The most trustworthy evidence concerning a possible neutrality agreement is the October 17, 2018 position letter of HCA Holdings and the Employer, submitted during the investigation of Case 16-CA-225103. That document is in evidence as General Counsel's Exhibit 7. Relying on it, I find that there is a neutrality agreement between HCA Holdings and the Respondent or an

affiliate of the Respondent, and that this agreement does not affect the terms and conditions of employment of bargaining unit employees.

Although the Charging Party testified that she believed the neutrality agreement did affect such terms and conditions of employment, she has not seen the agreement. Moreover, for reasons discussed above, I give little weight to her vague testimony concerning a telephone conversation with Michael Lamond, who did not testify. Both the position statement and the words which Zamora attributes to Lamond are hearsay, but I have considerably more confidence in the former than the latter.

Moreover, a “neutrality agreement” typically governs an employer’s conduct during a union organizing campaign rather than setting terms and conditions of employment. Here, where the Employer and Respondent have entered into an extensive collective-bargaining agreement addressing wages, hours and many other matters, and where that comprehensive contract makes no mention of a “neutrality agreement,” it is difficult to believe that the parties intended it to establish any conditions of employment.

At the end of the 94-page collective-bargaining agreement appear two “side letters” and one “memorandum of understanding.” If the “neutrality agreement” had any effect on terms and conditions of employment, presumably the contracting parties would have attached it to the collective-bargaining agreement, as they did these other “side agreements.” They did not.

Also, there is no apparent reason for these parties to keep secret a document specifying terms and conditions of employment. Either party might need to cite such a document during a grievance proceeding or arbitration.

Additionally, the Employer was not a party to the neutrality agreement. Only HCA Holdings entered into it. But the collective-bargaining agreement is between the Employer, Corpus Christi Medical Center, and the Respondent. HCA Holdings is not a party to that contract.

The credible and credited evidence falls well short of establishing that the neutrality agreement affected any term or condition of employment of bargaining unit employees. Therefore, I find that the neutrality agreement does not.

Further, I find that although the Employer obviously had exclusive access to those locked bulletin boards which displayed its official notices, the collective-bargaining agreement determined who would have access to the other locked bulletin boards. The complaint does not allege that the Respondent violated the Act by any failure to provide the Charging Party with a copy of this contract. Moreover, the evidence clearly establishes that the Respondent did furnish the Charging Party with a copy.

The relevant portion of the collective-bargaining agreement, Article 4, Section 3 (which is quoted verbatim above) provides that the Employer “will make available to the union a dedicated bulletin board” at certain specified locations. To “dedicate” means to “set aside specifically for a purpose.” The collective-bargaining agreement specifies that purpose, “the posting of union

notices communicating to bargaining unit employees.” Needless to say, the Charging Party’s flyers are not “union notices.”

The Respondent is the sole author of “union notices” and thus the sole authorizer deciding what to post on the bulletin boards dedicated to its use. However, the complaint in this case does not allege that the Respondent violated the Act by refusing to allow the Charging Party to post anything on any of these bulletin boards. Likewise, the General Counsel has not argued that the Respondent violated the Act by any failing to allow the Charging Party to post on these union bulletin boards.

The credited evidence establishes only that officers or agents of the Respondent posted notices on these union bulletin boards. I do not find that any employee, except for a union officer or agent, has been allowed to post anything on the locked bulletin boards dedicated to the Respondent’s use. Similarly, credited evidence fails to establish that anyone other than a manager or agent of management has posted anything on a locked bulletin board dedicated to the Employer’s use.

### Analysis

The General Counsel alleges, in paragraph 8 of the complaint, that the Respondent “owed the Charging Party a duty to represent her in good faith” and that the Respondent breached this duty by (a) refusing “to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 11, 2018,” and (b) responding “to the Charging Party’s July 11, 2018 request in a manner that was arbitrary and/or in bad faith.”

“Breaching a duty” means failing to do something the duty requires. A duty also can be breached by failing to perform the required act in a satisfactory manner. For example, an employer has a duty to furnish the employee’s exclusive collective-bargaining representative with requested information which is relevant to and necessary for that union to perform its representation function. It breaches that duty either by failing to provide the information at all, or by delaying unreasonably in doing so. *West Penn Power Co.*, 339 NLRB 585 (2003). Of course, sometimes a duty requires a person to refrain from performing some act. In those instances, a person breaches the duty by doing what he was obliged not to do.

Proving that a duty has been breached begins with establishing that a duty existed. In the present case, the General Counsel alleges, in paragraph 8(c) of the amended complaint, that the “Respondent owed the Charging Party a duty to represent her in good faith.” The burden falls on the General Counsel to establish that predicate fact.

Congress created the Board to administer the National Labor Relations Act, giving it authority to determine when the Act has been violated and to issue orders to remedy such violations. The Board’s authority to enforce duties is limited to those duties which the Act imposes. So, I begin by considering what the Act requires the Respondent to do.

After employees selected the Respondent to represent them, the Board certified it to be the bargaining unit employees' exclusive representative, as that term is used in Section 9(a) of the Act. Section 9(a) states, in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . .

29 U.S.C. § 159(a).

The Act requires the employer to bargain with the employees' exclusive representative and that union can invoke the Board's processes to compel the employer to do so. With this power comes responsibility. In *Miranda Fuel Co., Inc.*, 140 NLRB 181 (1962), the Board stated:

The privilege of acting as an exclusive representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume "the responsibility to act as a genuine representative of all the employees in the bargaining unit."

140 NLRB at 184, citing *Peerless Tool & Engineering Co.*, 111 NLRB 853 (1955). Thus, the duty of fair representation enforced by the Board concerns how a union wields the power which comes with its status as exclusive bargaining representative.

An exclusive bargaining representative answers to the employees it represents. When the union's exercise of its statutory authority affects a bargaining unit employee, it has a duty to provide that employee, on request, with certain information about what it did. For example, if such a union is representing an employee in a grievance proceeding, the union has the duty to furnish the employee, on request, information about the grievance and its status. *Local 1657, United Food & Commercial Workers, AFL-CIO, CLC (Food World)*, 340 NLRB 329 (2003); *Auto Workers Local 909 (General Motors Corp.—Powertrain)*, 325 NLRB 859 (1998); *American Postal Workers Union, AFL-CIO*, 328 NLRB 281 (1998).

The amount of information which it must provide depends on particular circumstances. However, in general, the information must relate in some fashion to the duties which the union assumed when it sought and accepted the status of exclusive bargaining representative. A union can violate Section 8(b)(1)(A) of the Act in some other fashion, by doing something which restrains or coerces employees in the exercise of their rights under the Act, but if the violation does not concern how the union used or failed to use the power bestowed on it by Section 9 of the Act, such a violation does not implicate the duty of fair representation which the Act imposes, and which is cognizable by the Board.

In the present case, the General Counsel only has alleged that the Respondent breached its duty of fair representation and does not allege that the Respondent violated Section 8(b)(1)(A) of the Act in some other manner. The Respondent's failure to furnish the Charging Party with a copy



of the neutrality agreement can only be a breach of the duty of fair representation if the neutrality agreement has something to do with the Respondent's representation function, that is, with the Respondent's discharge of its responsibilities as exclusive bargaining representative. The General Counsel bears the burden of proving such a connection.

An exclusive bargaining representative's statutory duties include meeting with the employer at reasonable times and "conferring in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. . ." 29 U.S.C. § 158(d). Representing employees in grievance proceedings falls within the duty to meet, confer, and negotiate about "any question arising" under the contract.

The credited evidence does not establish that the neutrality agreement controls or even relates to any term or condition of employment. Both the Employer and the Respondent state that it does not, and there is no credible evidence to the contrary. The Charging Party's testimony, that she "felt" that the neutrality agreement must have some effect on working conditions, amounts to nothing more than speculation.

Although the Charging Party believed that the neutrality agreement affected who could post notices on the locked bulletin boards, I find, to the contrary, that the collective-bargaining agreement alone established the Employer's bulletin board policy. Further, the record does not establish that the neutrality agreement prescribed or affected any other terms and conditions of employment of bargaining unit employees. Therefore, I conclude that the General Counsel has not carried the burden of proving that the neutrality agreement has any relationship to the Respondent's exercise of the authority bestowed on it by Section 9 of the Act or to the performance of its duties as the exclusive bargaining representative.

Because the neutrality agreement does not pertain to or affect the Respondent's representation of bargaining unit employees, I conclude that the Respondent's failure to furnish a copy of it to the Charging Party does not breach its duty of fair representation.

The complaint, as amended, also alleges that the Respondent breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by how its agent, Bradley Van Waus, answered the Charging Party's July 22, 2018 request for a copy of the neutrality agreement. Specifically, complaint paragraph 8(b) asserts that Van Waus's response was "in a manner that was arbitrary and/or in bad faith."

During oral argument, the General Counsel contended that the Respondent "provided the Charging Party with a parsed response intended to conceal whether or not it maintains a Neutrality Agreement with the Employer, or its corporate parent (HCA), that applies to bargaining unit employees. . ." The General Counsel further asserted:

Respondent's response to the Charging Party was nothing more than wordsmithing or parsing of legal language in effort to conceal whether or not it maintains a Neutrality Agreement with the Employer.

The General Counsel argued that the

Respondent ultimately has engaged in a classic “hide the ball” game here. It has refused to admit or deny whether any such Neutrality Agreement exists, while at the same time arguing that the Charging Party has never seen the Neutrality Agreement, so the Charging Party cannot prove that the agreement exists, or prove that it affects her terms and conditions of employment.

However, Van Waus’ July 25, 2018 reply to Zamora, which the General Counsel alleges to be violative, states plainly that

There is no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor’s Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015-June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center.

Moreover, Van Waus enclosed with this letter a copy of the collective-bargaining agreement. Thus, although Van Waus’ July 25, 2018 letter did not specifically deny the existence of a neutrality agreement, it unequivocally communicated that the collective-bargaining agreement alone set Zamora’s terms and conditions of employment.

My conclusion that Van Waus’ letter is unambiguous on this point does not suggest that it could not have been clearer regarding the existence or nonexistence of a neutrality agreement. However, Van Waus’ letter, which the General Counsel alleges to have been arbitrary and/or in bad faith, does not mislead the Charging Party and it states clearly that the collective-bargaining agreement was the sole agreement affecting how the Employer could deal with her as a bargaining unit employee.

The duty of fair representation imposed by the Act concerns how an exclusive bargaining representative uses the authority conferred by the Act, but the evidence does not establish that the Respondent was exercising such statutory authority when it negotiated the neutrality agreement with HCA Holdings. Since a union typically enters into a neutrality agreement while it is still organizing employees, it cannot be assumed that the Respondent was the exclusive bargaining representative when it negotiated that agreement.

Moreover, not every agreement negotiated by an exclusive bargaining representative pertains to or affects employees in the bargaining unit it represents. When a union enters into an agreement not affecting the terms and conditions of employment of workers in the bargaining unit, it cannot be presumed that the union was performing a function in its capacity as exclusive bargaining representative.

The General Counsel bears the burden of proving the relationship between the information sought and a union’s performance of its statutory duties. Here, the evidence does not establish such a relationship.

Therefore, I cannot conclude that the Respondent's reply to the Charging Party's July 11, 2018 request was arbitrary and/or in bad faith. Likewise, I cannot conclude that the Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. Accordingly, I recommend that the Board dismiss the complaint in its entirety.

### Conclusions of Law

1. At all material times, the Respondent, National Nurses Organizing Committee-Texas/National Nurses United (Respondent) has been a labor organization within the meaning of Section 2(5) of the Act. Labor Representative Bradley Van Waus is an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. At all material times, the Respondent has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of a bargaining unit consisting of employees of the Employer, Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center. This unit, which is described above under the heading "Amendment to Complaint Paragraph 6," is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act. The Charging Party, Esther Marissa Zamora, is an employee of the Employer and a member of this bargaining unit.

3. The Employer, Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.


4. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended<sup>4</sup>

### ORDER

The complaint is dismissed.

Dated Washington, D.C. June 24, 2020

  
Keltner W. Locke  
Administrative Law Judge

<sup>4</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.